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Charles P. Kindregan

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State Power Over Human Fertility and Individual Liberty

By CHARLES P. KINDREGAN*

*But man, proud man,
Drest in a little brief authority,
Most ignorant of what he's most assured,
His glassy essence, like an angry ape,
Plays such fantastic tricks before high heaven
As make the angels weep. . . .*¹

William Shakespeare
Measure for Measure

IN the coming decades humanity will be increasingly confronted with the prospect of technical control over the process of human reproduction. This prospect presents both an opportunity to work out our destiny intelligently and a danger to the individual freedoms we now cherish. While a number of publications have attempted to focus on the implications of biomedical research on human fertility,² the legal and social aspects of the control of human life in its genesis will need the attention of wise men if a totalitarianism of the technocrats is to be avoided. The purpose of this article is not to propose any grand designs by which free men can walk through the age of the biological revolution. Neither does it propose that the old formula of woman plus man equals baby is the essence of human freedom, although the author must admit to a certain comfortable feeling with that formula. Nor does it contain any absolute answers. Instead, it poses questions which should be answered before man is confronted

* B.A., 1957, La Salle College; M.A., 1958, La Salle College; J.D., 1966, Chicago-Kent College of the Law of the Illinois Institute of Technology; LL.M., 1967, Northwestern University Law School. Professor of Law, Suffolk University Law School. Member, Illinois Bar and Massachusetts Bar.

1. Shakespeare, *Measure for Measure*, act II, sc. II, lines 178-83.

2. See, e.g., R. FRANCOEUR, *UTOPIAN MOTHERHOOD* (1970); G. LEACH, *THE BIOCRATS* (1970); F. OSBORN, *THE FUTURE OF HUMAN HEREDITY* (1968); A. ROSENFELD, *THE SECOND GENESIS* (1969); *THE CONTROL OF HUMAN HEREDITY AND EVOLUTION* (R. Sonneborn ed. 1965); G. TAYLOR, *THE BIOLOGICAL TIME BOMB* (1968).

with the *fact* of state control over human reproduction, and it also comments on the legal problems which will be raised by the biological revolution in the area of human fertility. The aim of this article is simply to prod some more profound thinking on the social and legal aspects of state power over human fertility.

The Prospect of Government Control Over Human Reproduction

The responsibility for the transmission of life has by tradition, necessity, and law been entrusted to the private discretion of the family. In *Griswold v. Connecticut*³ a concurring opinion by Justice Goldberg described the nature of familial privacy.

Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.⁴

But what the law today considers an area of family privacy may in the future become a matter of public concern. We live in an age of growing respect for the private personality despite the demand for greater collectivization. Professor Rosemary Radford Ruether has accurately described this process:

The axis of the evolution of the modern earth is toward . . . a unitary humanity that is both increasingly personal and increasingly collective. The second aspect of this revolution in collective self-consciousness is the technological revolution whereby man increasingly gains control of all the world processes: reproduction, atomic energy, the basis of all cosmic processes, even the reproduction of the evolutionary processes in the mutation of genes and the creating of life.⁵

In Professor Charles Reich's "Consciousness III" there is "[r]espect for each individual, for his uniqueness, and for his privacy,"⁶ but how does an individual of the Woodstock Nation relate to a state which has in its hands control of the most basic biological process? The challenge of the future is to maintain respect for the privacy of human personality in the face of the collective-technological revolution. To

3. 381 U.S. 479 (1965).

4. *Id.* at 495, quoting *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

5. R. RUETHER, *THE RADICAL KINGDOM* 210 (1970).

6. C. REICH, *THE GREENING OF AMERICA* 385 (1970).

meet this challenge intelligently we must consider to what extent the traditional privacy of the nuclear family and the right to control one's body should be sacrificed to a greater demand of society.

Public demands for population control are bound to increase the pressure for government participation in fertility. The population explosion calls for a decrease in the rate of human reproduction if the species is to survive.⁷ In the United States the birth rate has been reduced from 23.8 per thousand in 1960 to 18.3 per thousand in 1970.⁸ However, the threat of overpopulation will remain in the world picture for many years,⁹ and even the United States is far from a zero growth rate. For this reason the Committee on Resources and Man of the National Academy of Sciences' National Research Council has said:

Our Departments of State and of Health, Education and Welfare should adopt the goal of real population *control* both in North America and throughout the world. Ultimately this implies that the community and society as a whole, and not only the parents, must have a say about the number of children a couple may have.¹⁰

In addition, the "population implosion" of millions into impersonal overcrowded metropolitan areas threatens to destroy the quality of human life.¹¹ Because the ecology of nature is endangered, we now seek to control our urban-industrial life style and processes. Human activities once left to private concerns are increasingly regulated by government through legislation. It has already been suggested that

7. See generally FAMILY PLANNING AND POPULATION PROGRAMS (B. Berelson ed. 1966); POPULATION EVOLUTION AND BIRTH CONTROL (2d ed. G. Hardin 1969); POPULATION IN PERSPECTIVE (L. Young ed. 1968). This is also the conclusion of the Commission on Population Growth and the American Future in its Report Number 1 to the President and Congress, March 11, 1972.

8. N.Y. Times, Oct. 3, 1971, at 78, col. 5. The decline in the birth rate is analyzed in G. GRIER, THE BABY BUST (1971).

9. See generally P. EHRLICH, THE POPULATION BOMB (1968); P. EHRLICH & A. EHRLICH, POPULATION RESOURCES ENVIRONMENT (1970).

10. Comment, *Population Control—The Legal Approach to a Biological Imperative*, 1 ECOLOGY L.Q. 143, 153-54 (1971) quoting B. BATES, RESOURCES AND MAN 11 (1969).

11. A report published by the United States Government describes this phenomenon: "What will happen to the quality of life if we come to the point where available natural areas of this continent can no longer sustain the hordes of trampling feet?"

As population crowds in, will not the quality experience be sacrificed first?" U.S. DEP'T OF INTERIOR, CONSERVATION YEARBOOK NO. 2, THE POPULATION CHALLENGE 13 (1966).

the environmental threat of private reproduction will undergo similar regulation.¹²

At first there will be increasing demands for the education of the public to the need for a zero growth rate and genetic improvement of the species, but if voluntary efforts fail, the demands will be for state compulsion to achieve these goals. Scientists now recognize that traditional concepts of family planning are not adequate to achieve a zero growth rate. A survey of the biological sciences compiled by members of the National Academy of Sciences found that:

"Family planning" is not equivalent to population control. Family planning is the rational and deliberate spacing of children in the number desired by the parents. But that number is determined by cultural considerations, family income, and ego satisfaction in the developed nations, and by the economic utility of children in the underdeveloped nations. Accordingly, large families are the norm among the affluent and among the ignorant poor. Population control demands that families be limited to the replacement rate.¹³

Just as the failure of industry to voluntarily control its pollution of the environment has stimulated coercive legislation,¹⁴ so the pressure created by overpopulation, urbanization and the biological revolution will give rise to government control over human reproduction. The introduction of a bill to limit the federal income tax personal exemption to two children per family¹⁵ is only a first feeble step toward what promises to be a flood of conception-control legislation. Already a leading scientist has put the case for this viewpoint:

Freedom to breed will bring ruin to all. At the moment, to avoid hard decisions many of us are tempted to propagandize for conscience and responsible parenthood. The temptation must be resisted, because . . . [t]he only way we can preserve and nurture other and more precious freedoms is by relinquishing the freedom to breed . . .¹⁶

We thus face the prospect of our descendants living in a better (state-determined) quality atmosphere, but stripped of individual, familial, and sexual freedom as we know it. We may judge it necessary to

12. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Lamm, *The Reproductive Revolution*, 56 A.B.A.J. 41 (1970); Comment, *Population Control—The Legal Approach to a Biological Imperative*, 1 ECOLOGY L.Q. 143 (1971).

13. COMMITTEE ON LIFE SCIENCES, NATIONAL ACADEMY OF SCIENCES, BIOLOGY AND THE FUTURE OF MAN 906 (P. Handler ed. 1970).

14. Farrell, *Let the Polluter Beware*, CASE & COM., Sept.-Oct., 1970, at 36.

15. S. 3632, 91st Cong., 2d Sess. (1970) (introduced by Senator Packwood, R., Ore.).

16. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1248 (1968).

submit to such controls, but we should not do so without careful consideration of the consequences.

To appreciate the potential magnitude of state control over human fertility we shall look at several developments. Our experience with compulsory eugenic sterilization has raised some legal problems with respect to state power over individual reproductive power. In addition, germinal selection through artificial insemination by donor provides us with a working model of the use of scientific breeding techniques and has also raised legal problems. Finally, the biological revolution promises to develop methods of sexual reproduction which will make the state's dependence on the family obsolete; the use of these methods by the state to control human fertility, however, may not square with our current understanding of the rights of privacy and freedom of religion. These developments raise questions our legislatures should begin to consider more fully.

The Experience of State Control Over Fertility: Compulsory Eugenic Sterilization

In 1863, Francis Galton proposed a theory of "eugenics" by which man could improve his heredity.¹⁷ The premise of this theory was that if the quality of human stock were to be preserved and improved, it would be *necessary* for the state to use its police power to prevent the diseased, the poor, and the criminal from reproducing. The technique by which the state would achieve genetic purity was relatively simple—it would sterilize each person who was classified as socially inadequate. The Model Eugenical Sterilization Law defined a socially inadequate person as "one who by his or her own effort, regardless of etiology or prognosis, fails chronically in comparison with normal persons, to maintain himself or herself as a useful member of the organized social life of the state."¹⁸ The model law listed examples of socially inadequate persons:

- (1) Feeble-minded, (2) Insane, (3) Criminalistic, (4) Epileptic (5) Inebriate (6) Diseased (including tubercular, syphilitic, and leprous persons) (7) Blind, (8) Deaf, (9) Deformed (including the crippled) and (10) Dependent (including orphans, never-do-wells, the homeless, tramps and paupers).¹⁹

It may surprise some that a model law proposing forcible sterilization could be advocated under the auspices of an American court

17. F. OSBORN, PREFACE TO EUGENICS 80 (1951).

18. H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 446 (1922).

19. *Id.* at 446-47.

in 1922.²⁰ Yet the more remarkable truth is that by that year fifteen American states were already engaged in compulsory sterilization of their eugenically deficient subjects. Moreover in 1927 the United States Supreme Court held that the Commonwealth of Virginia could compel an eighteen-year-old feeble-minded mother of an illegitimate child to undergo eugenic sterilization.²¹ The majority opinion of Justice Holmes accepted totally the proposition that the state can assert prohibitory power over the reproductive processes of those who are not fit to propagate.

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead . . . society can prevent those who are manifestly unfit from continuing their kind.²²

Some cases have suggested that the forcible sterilization of genetically or socially defective persons is a denial of equal protection of the law,²³ a denial of substantive due process,²⁴ a denial of procedural due process,²⁵ unconstitutionally vague,²⁶ or a cruel and unusual punishment.²⁷ In addition, when a state uses its power to forcibly sterilize

20. The Model Code was developed by Harry H. Laughlin, Eugenics Associate of the Psychopathic Laboratory of the Municipal Court of Chicago. In an introduction Chief Justice Harry Olson wrote that "sterilization protects future generations." *Id.* at vi.

21. *Buck v. Bell*, 274 U.S. 200 (1927).

22. *Id.* at 207.

23. *E.g.*, *Haynes v. Lapeer*, 201 Mich. 138, 166 N.W. 938 (1918); *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 88 A. 963 (1913); *Osborn v. Thomson*, 185 App. Div. 902, 171 N.Y.S. 1094 (1918), *aff'g In re Thomson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct. 1918). These decisions were based on the theory that limiting compulsory sterilization to inmates was a violation of the equal protection clause. In *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925) the court objected to the fact that the statute applied only to feeble minded persons whose children would probably become dependent on the state and not to all feeble minded persons.

24. *E.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring).

25. *E.g.*, *Opinion of the Justices*, 230 Ala. 543, 162 So. 123 (1935) (person ordered sterilized has a right to judicial hearing after administrative order); *Williams v. Smith*, 190 Ind. 526, 131 N.E.2d (1921) (denial of right to cross-examine and present evidence against order is fatal to statute).

26. *E.g.*, *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968) (Newton, J. dissenting).

27. *E.g.*, *Davis v. Berry*, 216 F. 413, 416 (S.D. Iowa 1914) (forced vasectomy of twice-convicted felon evokes shame, humiliation and degradation), *rev'd on other*

primarily over one race it violates the equal protection of the laws assured by the Fourteenth Amendment.²⁸

But other court decisions have upheld the right of the state to compel sterilization of mentally deficient persons,²⁹ of feeble-minded women who have illegitimate children,³⁰ and of a man who had been convicted of the statutory rape of a girl under ten years old.³¹

While those eugenic sterilization statutes still in force³² have been criticized more than praised in recent years,³³ the *power* of the state to compel the citizen to forfeit his reproductive ability has not been questioned, provided the requirements of due process and equal protection are met. The attitude of the Supreme Court of Nebraska, expressed in 1968, reflects sixty years of judicial treatment of the state power issue.

It is generally the law that the police power of the state is broad enough to permit the sexual sterilization of mentally deficient inmates

It can hardly be disputed that the right of a woman to bear and the right of a man to beget children is a natural and constitutional right, nor can it be successfully disputed that no citizen has any rights that are superior to the common welfare. Acting for the public good, the state, in the exercise

grounds, 242 U.S. 468 (1917) (question moot because statute repealed); *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918) (that state could execute convicted rapist does not mean it can burden his life with sterility).

28. *Cf. Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

29. *E.g.*, *State v. Troutman*, 50 Idaho 673, 299 P. 668 (1931); *In re Clayton*, 120 Neb. 680, 234 N.W. 630 (1931).

30. *Buck v. Bell*, 274 U.S. 200 (1927) (eighteen year old female with one child); *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968) (thirty-five year old female with eight illegitimate children); *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962) (eighteen year old female with I.Q. of 36 and one illegitimate child).

31. *State v. Feilen*, 70 Wash. 65, 126 P. 75 (1912).

32. ARIZ. REV. STAT. ANN. § 36-531 to -540 (1956); CAL. WELF. & INST'NS CODE § 7254 (West 1971); CONN. GEN. STAT. REV. § 17-19 (Supp. 1972-73); DEL. CODE ANN. tit. 16, §§ 5701-05 (1953); IDAHO CODE §§ 66-801 to 812 (1949, Supp. 1969); IND. CODE §§ 22-1601 to 618 (1964 Supp. 1971); MICH. COMP. LAWS §§ 720-301 to 310 (1968); MISS. CODE ANN. §§ 6957 to 64 (1966); N.H. REV. STAT. ANN. §§ 174:1-14 (1964); N.C. GEN. STAT. §§ 35-36 to 57 (Supp. 1971); OKLA. STAT. ANN. tit. 43A, §§ 341-46 (1954); S.C. CODE ANN. §§ 32-671 to 680 (1962); UTAH CODE ANN. §§ 64-10-1 to 64-10-14 (1968); VA. CODE ANN. §§ 37.1-156 to -171 (1970); W. VA. CODE ANN. §§ 16-10-1 to 16-10-7 (1966); WIS. STAT. ANN. § 46.12 (1957).

33. *See, e.g.*, *Bligh, Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965); *Cook, Eugenics or Euthenics*, 37 ILL. L. REV. 287 (1943); *Ferster, Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966); *Kalven, A Special Corner of Civil Liberties: A Legal View*, 31 N.Y.U.L. REV. 1222 (1956); *Kindregan, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 CHI-KENT L. REV. 123 (1966).

of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, the state may limit a class of citizens in its right to bear or beget children with an inherited tendency to mental deficiency. . . .³⁴

Perhaps compulsory sterilization for eugenic reasons is somewhat analogous to the power of the state to forcibly vaccinate its subjects³⁵ or to its limited power to invade the body of a man suspected of drunken driving in order to procure a blood sample.³⁶ But the power to reproduce one's kind is "fundamental to the very existence and survival of the race"³⁷ and a "basic liberty"³⁸ of the individual; its forcible destruction is more serious than the injection of a health-giving substance into the body or the withdrawal of a blood sample.

The legal philosopher might properly inquire if a state which may sterilize those who in the words of Mr. Justice Holmes "sap the strength of the state"³⁹ might not properly prohibit reproduction as part of a program to achieve genetic improvement of the race. Is it such a great jump from compulsory sterilization to a policy of genetic improvement which "violates the fundamental rights of the human person, and confers powers on the State to which it has no claim"?⁴⁰

Artificial Insemination: Midpoint in the Movement Toward the Biological Brave New World

Artificial insemination by donor (AID) is a voluntary technique of life control which may be the archetype of what has been called "the second Genesis."⁴¹ It has been used to achieve human conception for at least half a century. Properly called heterologous insemination, it is accomplished by placing the spermatozoa of a donor into the reproductive organs of the female where a spermatozoan can then fertilize the ovum.⁴² Ovum transplantation is a similar technique in which

34. *In re Cavitt*, 182 Neb. 712, 714-15, 157 N.W.2d 171, 174-75 (1968).

35. This power was implied in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

36. *Schmerber v. California*, 384 U.S. 757 (1966).

37. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

38. *Id.*

39. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

40. N. ST. JOHN STEVAS, *LIFE, DEATH AND THE LAW* 191 (1961).

41. See A. ROSENFELD, *supra* note 2.

42. If the spermatozoa used is not that of the female's husband the procedure is called artificial insemination by donor (AID). If the husband's spermatozoa is used the procedure is called artificial insemination by husband (AIH). Some physicians accomplish AID by mixing the husband's spermatozoa with that of the donor or mixing the husband's sperm with the seminal plasma of a donor to increase mobility;

an ovum of a donor female is transferred to the organs of a donee female. The ovum can be fertilized either before or after transplantation, but the purpose of the procedure is to initiate a pregnancy in the donee.⁴³ AID is increasing in frequency;⁴⁴ ovum transplantation is still largely experimental.⁴⁵

There are various motivations for the voluntary use of artificial insemination today. The impotence of the male or the prevention of the communication of a hereditary defect to a child are obvious. But if the procedure is totally voluntary, why is it relevant to a discussion of state power over human fertility? Because artificial insemination, if approved and encouraged by the state, tends to upset the traditional, totally private, monogamous method of human reproduction. By sanctioning the intervention of a third party (the donor) into the process, the state is approving a trend toward treating reproduction as a social as opposed to a private act. Artificial insemination also creates a potential for direct state intervention into the reproductive process.

Artificial Insemination and the Law

In microcosm, the practice of artificial insemination by donor has already confronted the law with problems which the biological revolution promises to magnify many times over. The cases are few, but they reflect a judicial confusion in dealing with the clash between the power of science over human reproduction and traditional family values. An example of this confusion is apparent in cases in which adultery is at issue. In a Canadian decision, AID without the consent

these procedures are sometimes called AIHD or biseminal artificial insemination (AIB). Lombard, *Artificial Insemination—Civil Law and Ecclesiastical Views*, 2 SUFFOLK L. REV. 137, 139 (1968). Artificial insemination is also called "telegensis," "therapeutic insemination," and "applied eugenics." J. LOMBARD, FAMILY LAW § 217 (1967). See also W. FINEGOLD, ARTIFICIAL INSEMINATION (1964); Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 15 OBST., GYN. SURVEY 767 (1960); Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484 (1948); Ploscowe, *Your Test-Tube Baby May Be Illegitimate*, 8 LAWS. GUILD REV. 497 (1948); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968); Weinstock, *Artificial Insemination—The Problem and the Solution*, 5 FAMILY L.Q. 369 (1971); Note, *Legal and Social Implication of Artificial Insemination*, 34 IOWA L. REV. 658 (1949); Note, *Artificial Insemination—Its Sociolegal Aspects*, 33 MINN. L. REV. 145 (1949); Note, *Artificial Insemination Versus Adoption*, 34 VA. L. REV. 822 (1948); Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859.

43. Jean Rostand has proposed to call this technique "prenatal adoption." D. RORVICK, BRAVE NEW BABY 189 (1971).

44. Smith, *For Unto Us a Child is Born—Legally*, 56 A.B.A.J. 143 (1970).

45. R. FRANCOEUR, UTOPIAN MOTHERHOOD 109-12 (1970).

of the husband of the impregnated woman was said to be adultery, the correspondent was the administering physician.⁴⁶ But in *MacLennan v. MacLennan*,⁴⁷ a Scottish decision by Lord Wheatly, this reasoning was not followed:

The argument of pursuer's counsel was that adultery meant the introduction of a foreign element into the marital relationship. That, however, seems to me to beg the question, because what has still to be determined is what is the foreign element? . . . [T]hat foreign element is the physical contact with an alien and unlawful sexual organ, and without that element there cannot be what the law regards as adultery.⁴⁹

Similarly, in a criminal prosecution for nonsupport, the Supreme Court of California described the equation of AID with adultery as "patently absurd."⁵⁰

The legal relationship of the child conceived by AID to both his biological father (the anonymous donor) and to the husband of his mother is yet more confused. For example, in *Doornbos v. Doornbos*⁵¹ a child conceived by AID in the womb of a married woman was said to be illegitimate. However, if the husband consents to the AID by signing an authorization to the physician, he may be convicted for nonsupport without regard to the status of the child.⁵² New York courts have found a child conceived with the husband's consent by AID illegitimate in a support context,⁵³ and legitimate in a visitation rights case.⁵⁴ In yet another New York case the court held that a woman who had conceived her children by AID should be prohibited from testifying to that fact in order to protect the presumed legitimacy of the children.⁵⁵

There are other issues raised by AID which have not been directly examined in the case law. These include the tort standard of care applicable to the physician or agency which selects the donor,

46. *Orford v. Orford*, [1921] 58 D.L.R. 251. This was dicta since the court found that Mrs. Orford had committed adultery in the ordinary, natural way. See also *Russell v. Russell*, [1924] A.C. 687, 721 (dictum).

47. [1958] Sess. Cas. 105 (Scot.).

49. *Id.* at 114.

50. *People v. Sorenson*, 68 Cal. 2d 280, 289, 437 P.2d 495, 501, 66 Cal. Rptr. 7, 13 (1968).

51. *Super. Ct. Cook Co., Ill. No. 54514981* (1954), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (published in abstract only).

52. *People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

53. *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

54. *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

55. *Abajian v. Dennett*, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).

the legal relationship of the donor to the child, the proper contents of birth records, and the requirement of consent to the donation by the wife of the donor. A few states have in recent years adopted statutes making AID children conceived by married women with the husband's consent legitimate.⁵⁶ One statute explicitly provides criminal penalties for nonsupport of an AID child by a consenting husband.⁵⁷ Other statutes require that the administration of AID be done by a licensed physician.⁵⁸ There has been little legislative interest, however, in state control over sperm or ova banks which secure, store and distribute germinal materials, although there is at least one city ordinance which regulates these activities.⁵⁹

State Control Over AID

The step from the voluntary use of AID to government control may not be a difficult one. As AID becomes fairly common, it is more than probable that the government will regulate the processes by which genetic materials are selected, stored, and distributed. The exercise of the police power to regulate matters of public health would seem to require that much. Further, public health officials are unlikely to restrain the tendency to make *qualitative* judgments once they begin to regulate the practice by which germinal materials are selected. And if the government regulates the storage and distribution of sperm and ova, can it refrain from injecting itself into the question of whose sperm and whose ova are worthy of storage?⁶⁰

Alvin Toffler has described the trend toward separating biological parenthood from actual parenthood. He suggests that in the future the primary parents will be a group of licensed professionals (pro-parents) who will oversee all aspects of the child's education; the biological parents (bio-parents) will pay the expenses of this service.⁶¹

56. ARK. STAT. ANN. § 61-141(e) (1971); GA. CODE ANN. § 74-101.1(a) (Supp. 1970); KAN. STAT. ANN. § 23-128 (Supp. 1971); OKLA. STAT. ANN. tit. 10, §§ 551-2 (Supp. 1971); N.C. GEN. STAT. 49A-1 (1971).

57. CAL. PEN. CODE § 270 (West 1970).

58. GA. CODE ANN. § 74-101.1(b) (Supp. 1971); OKLA. STAT. ANN. tit. 10, § 553 (Supp. 1971).

59. NEW YORK CITY HEALTH CODE § 112.

60. It has been suggested that in the case of widespread nuclear contamination a government might forbid the conception of children except by use of genetic materials issued by the government from pre-stored stocks. G. TAYLOR, *THE BIOLOGICAL TIME BOMB* 34 (1968). Is a government in such circumstances to completely refrain from deciding what qualities can be transmitted to the next generation by careful selection of the material stored?

61. A. TOFFLER, *FUTURE SHOCK* 215-17 (1970).

The idea of government control of child raising through the licensing and supervision of proparents is another means of state usurpation of what is now considered the private prerogative of the nuclear family. But the next question is whether we need bio-parents at all if their only function is to conceive and support. Would it not be more efficacious for the state to collect high quality genetic materials and use them to produce superior children in carefully maintained government laboratories, with the proparents taking over the child-rearing functions under government control? The prospect of the storage and typing of genetic materials in combination with the growing belief that pregnancy may soon be eliminated by the development of artificial wombs,⁶² make this possibility not totally unrealistic.

Artificial insemination is now a voluntary procedure, so issues of state power have not yet been raised. Most of the physicians who use this technique are not interested in eugenics; their concern is to help their patient conceive a child. Under present procedures the donor is anonymous, few detailed records are kept, and everything is done as secretly as possible.⁶³ But interest in AID as a tool of eugenic improvement of the race has been in existence for a number of years, dating back at least to the "germinal choice" proposal of the Nobel Laureate Hermann J. Muller.⁶⁴ Muller suggested a plan to up-grade the genetic quality of human genetic stock by encouraging the use of artificial insemination with the sperm of genetically well-endowed donors. This concept—a program of voluntary germinal choice—has received support from leading figures in science, including Julian Huxley and F.H. Crick.⁶⁵ Those who endorse this viewpoint see a eugenically oriented program of AID as a means of helping "mankind progress toward a higher estate under scientific guidance."⁶⁶ By eliminating undesirable traits and using only those sperm donors having

62. Scientific opinion indicates that circumstances of human pregnancy can be duplicated and improved by technology. The use of an artificial uterus to develop embryonic life is called ectogenesis. A popular description of this may be found in D. RORVICK, *supra* note 43, at 78-84 (1971). See also A. ROSENFELD, *supra* note 2, at 118-20 (1969).

63. Guttmacher, *Artificial Insemination*, 97 ANN. NEW YORK ACAD. SCIENCES 623 (1962). For a practicing gynecologist's explanation of these procedures see W. FINEGOLD, *ARTIFICIAL INSEMINATION* (1964).

64. Muller, *The Guidance of Human Evolution*, 3 PERSP. BIOL. MED. 1 (1959); Muller, *Genetic Progress by Voluntarily Conducted Germinal Choice*, in MAN AND HIS FUTURE 247 (G. Wolstenholme ed. 1963); Muller, *Human Evolution by Voluntary Choice of Germ Plasm*, 134 SCIENCE 643 (1961).

65. D. RORVICK, *supra* note 43, at 2-3 (1971).

66. R. DUBOS, MAN ADAPTING 432 (1965).

desirable physical and mental characteristics the stock would be improved. This view has been criticized, however, by other biologists who see it variously as denying "the very evolutionary process that has carried us this far,"⁶⁷ as being a means of inadvertently proliferating the recessive genes of a popular donor through the population,⁶⁸ as diminishing genetic diversity,⁶⁹ and as requiring a wisdom in the selection of the desirable genetic traits which man simply does not yet possess.⁷⁰

Any proposal for germinal selection through AID must take into account that such a program cannot be completely voluntary. Of necessity, government would have to encourage participation by some program involving education, penalties, or incentives. Even more significant is the probability that no government could (or would) leave to the pure scientists the work of establishing the goals of planned genetic evolution and the means of achieving it. For a state to leave in the hands of private parties the power of radically altering the genetic quality of the population would require an act of political self-restraint of a character unknown in human history. If the human species could best be improved by a eugenic program backed by the power of the state, and the principle of state power over human reproduction had already been established by the control of population, the government would certainly not refrain from acting.

Theodouis Dobzhansky has stated what may be an ordinary premise in the future: "What we want is not simply natural selection, but selection, natural and artificial, directed toward humanly desirable goals."⁷¹ The state, however, will have the ultimate power of deciding what are humanly desirable goals, and there is a danger that political motivation will be a primary determinant. Dobzhansky has also written:

Some genetic defects will have to be put up with . . . , others will have to be treated genetically, by artificial selection, and the eugenic measures that may be needed can be effected without accepting any kind of biological Brave New World.⁷²

In a world of angels that might be possible, but can man act collectively

67. Rensberger, *Sperm Banks: From the Day of Deposit—A Lien on the Future*, N.Y. Times, Aug. 22, 1971, § E, at 7, col. 1.

68. *Id.*

69. P. MEDAWAR, *THE FUTURE OF MAN* (1960).

70. R. DUBOS, *supra* note 66, at 435.

71. Dobzhansky, *Man and Natural Selection*, 49 AMERICAN SCIENTIST 285, 298 (1961), reprinted in *MAN IN ADAPTATION* 37, 47 (Y. COHEN ed. 1968).

72. *Id.* at 46.

to control the quality of life without creating a Brave New World? Germinal selection through artificial insemination is the kind of proposal which will severely test the ability of man to govern himself efficiently while maintaining individual liberty.

Potential State Control of Human Life Through Asexual Reproduction: A Glimpse at the Future

In the early 1970's it may be impossible to understand how the state might deprive both the family and the individual of the power of human reproduction in order to produce a eugenic result. But the effort will someday be made, and in the attempt the state will be compelled to exercise the arbitrary choice of deciding what features of human life are the most desirable. The problem was aptly posed in a general review of the biological sciences published at the beginning of the decade:

Man, although potentially able to select his own genetic constitution, has not yet made use of this power. Selection is a harsh process. To make speedy progress, reproduction should be limited primarily to those who possess genotypes for the desired traits. But who will decide what is desirable? How much genotypic and phenotypic variability would be optimal in the human society? Who would dare to prohibit procreation to a majority of men and women, limiting this activity only to an elite group? And to whom would society entrust such decisions?⁷³

That the state will soon take positive steps to improve the genetic composition of man is based on three premises: First, that the state will act to control or limit private reproduction; second, that the movement to destroy the nuclear family will continue to gain force; and third, that man will achieve technical mastery over human reproduction.

The first premise is that the state will remove the right to reproduce from the realm of private choice and limit it to certain classes or situations. The primary motivation behind this will undoubtedly be the "population explosion" discussed above.⁷⁴ Once those in power realize that they actually have the means to produce a carefully selected generation of citizens, a strong secondary motive will be to accomplish specific political and social goals.

The second premise is that the trend toward disparaging the nuclear family will continue. Two generations ago the proposal of

73. NATIONAL ACADEMY OF SCIENCE, COMM. ON LIFE SCIENCES, BIOLOGY AND THE FUTURE OF MAN 926 (P. Handler ed. 1970).

74. See notes 7, 9-10 & accompanying text *supra*.

the childless "companionate marriage"⁷⁵ was greeted with universal scorn, but today serious writers are proposing that the child-centered nuclear family is near "complete extinction."⁷⁶ Such judgments are premature. Nevertheless, Alvin Toffler's idea that future spouses will postpone children until their career goals are completed and then purchase a fertilized embryo to raise in their retirement years is a distinct possibility.⁷⁷ In addition, the current demands of the feminists for free abortions on request, for day care centers, and for other means of escaping the responsibilities of raising children reflect new attitudes. These attitudes may slowly change our entire understanding of what family life is.⁷⁸ The antiheterosexualism obvious in certain aspects of gay liberation and women's liberation also manifest substantial anti-family feelings.⁷⁹ These are strong indications that the nuclear family will continue to come under sharp attack in the future.

The Biological Climate

A necessary prerequisite to the state's gaining control over the genetic composition of man is the achievement of nearly total technical mastery over human reproduction. For centuries the process of human reproduction was a mystery, but man may someday be able to do undreamed of things in passing on life to new generations. The biological and medical research of today may be either the tyranny or utopia of the future. I venture to predict that this mastery will be realized in the next thirty to sixty years. The problem is how man will use this power soon to be placed in his hands.

It is not the purpose of this article to detail those aspects of the biological revolution which promise to give man control over the transmission of life through asexual reproduction. However, at least a

75. See B. LINDSEY & W. EVANS, *THE COMPANIONATE MARRIAGE* (1927).

76. F. LUNDBERG, *THE COMING WORLD TRANSFORMATION* 295 (1963).

77. See A. TOFFLER, *supra* note 61, at 212-14 (1970). Perhaps the state will require the use of superior genetic material, but there already is underway a commercial project to allow men to store their semen. For example, Genetics Laboratory, Inc. of Minneapolis is opening a national chain of sperm banks which will store its clients' semen for \$55 and a \$15 annual storage fee. *N.Y. Times*, Oct. 17, 1971, at 65, col. 3.

78. It has been suggested that the family of the future may be a commune of lesbians. Bloch, *The Family of the Future* 15 (1970) (paper presented at the 10th Anniversary Conference of the Family Institute). Bloch described communes of male homosexuals as being tolerated for such work as "clothes designing and interior decorating." Nonfertile heterosexual relationships might be tolerated, but clearly considered "perverse." *Id.* at 15-17.

79. See A. KARLEN, *SEXUALITY AND HOMOSEXUALITY* (1971); *SISTERHOOD IS POWERFUL* (R. Morgan ed. 1970); D. TEAL, *THE GAY MILITANTS* (1971).

summary review of these developments is necessary if we are to understand the potential social and legal problems.

One of the most dramatic developments in biological research is the elimination of sex from human reproduction. Of course, the act of intercourse is not now essential to reproduction. But even in artificial insemination the genetic materials contributed by male and female are still necessary to reproduction. Now, the biological laboratory promises something much more radical: the ability to create human life with certain characteristics under carefully controlled laboratory conditions. Cloning, nuclear transplantation and parthenogenesis show the potential of asexual reproduction.

Cloning

Cloning is a method of asexual reproduction in which cell tissue from an adult organism is developed into a separate, but genetically identical, organism. Scientists have already used cloning to grow new plant life from existing tissue outside the normal seed method of reproduction.⁸⁰ It may take a decade, or even several decades, but what has been accomplished with plants may also be achieved with mammals. What is startling about cloning from a social point of view is that each of the offspring is reproduced from a cell of the parent and thus each is a genetic carbon copy of the parent. If the parent has a superior genetic composition the offspring will exhibit these superior characteristics. Natural ability, enabling a person to function as an athlete, an astronaut, a scholar or a soldier could be reproduced in quantity. A distinguished American theologian has suggested that in certain circumstances the state should resort to cloning:

It is entirely possible, given our present increasing pollution of the human gene pool through uncontrolled sexual reproduction, that we might have to replicate healthy people to compensate for the spread of genetic diseases If the greatest good of the greatest number (*i.e.*, the social good) were served by it, it would be justifiable not only to specialize the capacities of people by cloning or by constructive genetic engineering, but also to bio-engineer or bio-design para-humans I would vote for cloning top-grade soldiers and scientists, or for supplying them through other genetic means, if they were needed to offset an elitist or tyrannical power plot by other cloners.⁸¹

80. See D. RORVICK, *supra* note 43, at 107-18 (1971); A. ROSENFELD, *THE SECOND GENESIS* 128-35 (1969); G. TAYLOR, *supra* note 2, at 22-30 (1968).

81. Fletcher, *Ethical Aspects of Genetic Controls*, 285 *THE NEW ENGLAND J. MEDICINE* 776, 779 (1971).

The breeding of such mirror types might be encouraged to make available a supply of organ tissue for surgical transplantation. The need for human subjects for medical experimentation might also provide a motivation to clone certain classes of creatures ideally suited for such experimentation.⁸² Will a technically oriented, highly automated society of the future accept as part of its ethic the use of "cloned" people as guinea-pigs? Would individual liberty survive at all in such an atmosphere?

It has also been suggested that cloning would be an ideal technique for the perpetuation of a dictatorship, with the dictators being able to indefinitely continue themselves and their slaves in a horrible form of "anti-utopia."⁸³ The fear of misuse of clonal reproduction in private hands will prompt the state to intervene. Already this fear has caused a physiologist, Lord Rothschild, to call for a Commission for Genetical Control to license the use of clonal reproduction among humans.⁸⁴ State licensing will be only the first step; active involvement will probably follow. Yet state involvement requires a governmental decision as to who is *worthy* to be reproduced. This is a characteristic of a dictatorship—the judgment as to which life has qualities worth preserving and which is of such low quality that it is unworthy of life. It is paradoxical, but by the development of such asexual methods of reproduction as cloning the biological sciences may motivate the state to exercise power over human reproduction. The distinguished scientist Joshua Lederberg has taken issue with this by noting that life control could be abused only if the state has "instituted slavery in the first place."⁸⁵ But might not the power to blueprint a whole generation itself provide the impetus to a new form of slavery never before known to man? Certainly cloning would provide a basic tool for such genetic blueprinting, as was recently noted in an editorial by a leading medical journal:

[I]f the blueprinting of personalities is ever socially accepted or imposed, it would be much easier to achieve by cloning

82. The use of prisoners, institutionalized patients, medical students and other not-quite-so-free "volunteers" is already an accepted form of "anti-humanism." See M. PAPFORTH, *HUMAN GUINEA PIGS* xi (1967). In the name of progress medical and biological sciences even now sometimes abuse the patients, ignore the requirement of informal consent and transgress the bounds of individual human dignity.

83. A. ROSENFELD, *supra* note 80, at 134.

84. This proposal was made in an address to the Weizmann Institute of Science (Israel) in 1967 reported in G. TAYLOR, *supra* note 2, at 28, and RORVICK, *supra* note 80, at 116.

85. Lederberg, *Genetic Engineering*, 34 *PHAROS* 9 (1971).

Cloning is thus the aspect of genetic intervention that must require public discussion today.⁸⁶

Nuclear Transplantation

Nuclear transplantation is a form of reproduction without fertilization. It is accomplished by the removal of the haploid nucleus from an unfertilized ovum and the implantation of a diploid nucleus into the ovum. Experiments with various amphibian animals have demonstrated that nuclear transplantation is a real possibility. For example, scientists have taken a frog egg, removed the nucleus, and implanted into the egg a diploid nucleus of a frog embryo's body cell. This egg then grows into a frog which is an identical twin to the frog whose body cell was transplanted. Researchers are agreed that this procedure will be adapted to the higher animals, including livestock. It is only a matter of time before it will be technically possible to use nuclear transplantation on human eggs. If a particular person is considered beneficial to society, a brilliant scientist or lawyer, a mathematical or artistic genius, a brave soldier or talented athlete, he could be exactly reproduced in as many identical twins as desired. The problems this technique raises from the viewpoint of state power and individual liberty are similar to those discussed above.

Parthenogenesis

Parthenogenesis is any manner of reproduction by the female alone, without the use of male germinal materials. When I suggested a few years ago that parthenogenesis was a distinct possibility⁸⁷ in human beings, I received a number of unbelieving inquiries. My suggestion, however, was much too conservative. Parthenogenesis is a fact. In biological laboratories parthenogenesis has been achieved in various animals by using physical and chemical stimuli in place of male genetic materials.⁸⁸ The United States Department of Agriculture has bred turkeys by parthenogenesis.⁸⁹ Parthenogenesis may even occur spontaneously in human beings, although no case has been scientifically proven. Nevertheless, there is no doubt that parthenogenesis may become an efficient method of asexual reproduction in the

86. Davis, *Ethical and Technical Aspects of Genetic Intervention*, 285 NEW ENGLAND J. MEDICINE 799, 800 (1971).

87. C. KINDREGAN, *THE QUALITY OF LIFE* 22 (1969).

88. These experiments are summarized in A. ROSENFELD, *supra* note 80, at 30.

89. Olsen, *Nine Years of Summary Parthenogenesis in Turkeys*, 105 PROCEEDINGS OF THE SOCIETY FOR EXPERIMENTAL BIOLOGY AND MEDICINE (1960).

future. Since the offspring are female, except for an occasional defective male, a governmental decision to promote or even allow parthenogenesis would lead to a female oriented society.⁹⁰ The realization that the male is totally unnecessary to the continuation of the species would have profound consequences for his role in society. Again, the possibility of laboratory parthenogenesis raises the same state power issues as the previously discussed methods of asexual reproduction.

There are, of course, numerous other means by which the state may seek to assert its control over human life than through the use of government directed programs of asexual reproduction. The equally significant potential of compulsory genetic surgery of defective persons, control of the mind by the state,⁹¹ of the mechanical men,⁹² and the advent of the computerized society⁹³ all raise similar concerns for the role of private personality in the future.

The significance of these developments, however, should not cause us to ignore the fact that the growth of asexual means of reproduction proffers to the state the means of controlling one aspect of human life which of necessity previously resided solely in private hands. With this power the state could eliminate the family as a source of population supply. A population produced by genetic engineers could be programmed to suit the needs of society. By careful selection, classification and manipulation of genetic materials, government planners could produce desirable qualities in the citizenry. Of course, such power may "cause races or types which are inimical to the dominant group to wither and disappear."⁹⁴ Hopefully, a predesigned generation of citizens can be free men. But as the philosopher Herbert J. Muller has said of life control, it is a "pretty dangerous kind of power to give men. . . ."⁹⁵

The Rights of a Carrier of Genetic Defect

The issue of state intrusion into the process of human reproduc-

90. The prophecy mentioned in note 78 *supra* might not be so fantastic after all. It may be true that "a mammal is essentially female unless special factors intervene." Bloch, *supra* note 78, at 15-17.

91. Beatly, *Sex Determination in Mammals*, in *THE BIOLOGY OF SEX* 117 (J. Allison ed. 1967). See also G. TAYLOR, *supra* note 43, at 151-57; D. RORVICK, *supra* note 43, at 123-38.

92. See, e.g., R. DUBOS, *supra* note 66, at 431-37 (1965); D. RORVICK, *supra* note 43, at 151-70.

93. See A. MILLER, *THE ASSAULT ON PRIVACY* (1971).

94. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

95. H. MULLER, *THE CHILDREN OF FRANKENSTEIN* 136 (1970).

tion for eugenic reasons is a fundamental concern of this article. It is appropriate, therefore, to briefly analyze this issue from the perspective of a potential parent who is a carrier of a transmissible genetic defect. It could well be argued that such a person should not be deprived of any civil rights simply because he carries a genetic defect. But as the emphasis on the quality of life continues to become more pronounced it is reasonable to expect that there will be considerable social pressure on this person to avoid human reproduction.

There are many possible legislative approaches to this problem. The law might permit, encourage, or even require a eugenic abortion where an amniocentesis has demonstrated that the fetus has muscular dystrophy, Down's Syndrome, or XXX Syndrome. It might compel each person applying for a marriage license to undergo genetic counselling, and if one carries a defect it might require him to undergo genetic surgery or sterilization as a condition precedent to marriage. Or the law might prohibit the use of asexual reproduction techniques to the genetically defective person. Many of the means by which the state could minimize genetic defects would not seriously infringe upon the rights of the carriers. For example, government funding of research into genetic and congenital defects could be greatly increased. In addition, the availability of free prenatal care for every American woman would reduce congenital birth defects. The state should also encourage and aid the growth of voluntary genetic counselling and law of annulment should recognize the intentional concealment of substantial genetic defects as fraud running to the essence of marriage. Finally, the state should fund and promote educational programs which teach the use of voluntary contraception for eugenic purposes. Much can be done without infringing upon individual rights to minimize genetic defects; little has been done.

State Intrusion and the Right to Privacy

The greatest obstacle to the assertion of state power over human fertility is found in the current trend toward a recognition of privacy in the areas of human reproduction and sex. In *Griswold v. Connecticut*⁹⁶ the Supreme Court of the United States declared that the private sexual relation of a husband and wife was protected from the exercise of state power to inhibit contraception. The "zone of privacy" enjoyed by husband and wife in their sexual life is preserved by

96. 381 U.S. 479 (1965).

several fundamental constitutional guarantees.⁹⁷ A concurring opinion in *Griswold* describes the integrity of family life as "something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . ."⁹⁸ Thus, the developing right of privacy stands between the power of the state and the private decision of the family as to human reproduction. Although it mentions only family size, the following statement which has been agreed to by thirty nations is also relevant:

The Universal Declaration of Human Rights describes the family as the natural and fundamental unit of society. It follows that any choice and decision with regard to the size of the family must irrevocably rest with the family itself, and cannot be made by anyone else.⁹⁹

A number of decisions on the constitutionality of abortion statutes have questioned the right of the state to limit the termination of a pregnancy. In *People v. Belous*¹⁰⁰ the Supreme Court of California ruled that the state did not have a compelling interest sufficient to allow it to restrict abortion to situations in which it was necessary to preserve the mother's life. Similarly, in *Roe v. Wade*¹⁰¹ a federal district court declared the Texas abortion statute unconstitutional because it deprived single women and married couples of their constitutional rights to choose whether to have children. Another federal district court, in holding a Georgia abortion statute unconstitutional, found that:

Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained.¹⁰²

Perhaps not recognizing the far reaching implication of its language, a Pennsylvania court held an abortion statute unconstitutional and said the statute was in conflict with a solution to one of the world's critical problems, the population explosion.¹⁰³

Despite the frequency with which abortion statutes are overturned,

97. *Id.* at 485.

98. *Id.* at 495 (Goldberg, J., concurring), quoting *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

99. POPULATION, EVOLUTION AND BIRTH CONTROL 375 (2d ed. G. Hardin 1969).

100. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

101. 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971).

102. *Doe v. Bolton*, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970), *prob. juris. postponed*, 402 U.S. 941 (1971).

103. *Commonwealth v. Page No. 1968-353* (Ct. C.P. Centre County, Pa. July 23, 1970) at 4.

the abortion cases are a confused model for the privacy versus state power issue since they include the issue of the rights of unborn children.¹⁰⁴ Further, the regulation of abortion does not interfere with sexual relations:

Prevention of abortion does not entail state interference with the right of marital intercourse. Nor does enforcement of a statute against abortion require invasion of the conjugal bedroom.¹⁰⁵

The limits of state power to intrude into the private zone of family, sex, and reproduction have also been examined in other cases. In *Baird v. Eisenstadt*¹⁰⁶ the United States Court of Appeals for the First Circuit ordered the district court to grant a writ of habeas corpus to a man convicted of exhibiting and delivering a contraceptive to an unmarried woman; the United States Supreme Court affirmed the decision. The court held that the statute under which the defendant was convicted interfered with fundamental human rights. In *Loving v. Virginia*¹⁰⁷ the Supreme Court of the United States said that the freedom to marry is a "fundamental freedom," a "personal right," and "one of the basic civil rights,"¹⁰⁸ which the state may not limit by miscegenation statutes.¹⁰⁹ Similarly, in *Perez v. Sharp*¹¹⁰ the Supreme Court of California in voiding that state's miscegenation statute, described marriage as a "fundamental right of free men."¹¹¹ Finally, in *Pierce v. Society of Sisters*¹¹² the United States Supreme Court ruled that state power could not prevent a parent from choosing his child's education. In each of these cases the private rights were of a constitutional or fundamental character. If the state intrudes into these areas it has the burden of justifying the intrusion by showing a compelling public interest. A desire to improve the quality of life is not presently such a compelling public interest. However, there are those who be-

104. See D. CALLAHAN, ABORTION 307-407 (1970); G. GRISEZ, ABORTION 267-466 (1970); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233 (1969).

105. THE MORALITY OF ABORTION 234 (J. Noonan ed. 1970).

106. 429 F.2d 1398 (1st Cir. 1970), *aff'd* 40 U.S.L.W. 4303. See also *Commonwealth v. Baird*, 355 Mass. 746, 247 N.E.2d 574 (1969), *cert. denied*, 396 U.S. 1029 (1970).

107. 388 U.S. 1 (1967).

108. *Id.* at 12.

109. The United Nations Universal Declaration of Human Rights provided that "men and women . . . have the right to marry and found a family." G.A. Res. 217, U.N. Doc. A/810, at 74 (1948).

110. 32 Cal. 2d 711, 198 P.2d 17 (1948).

111. *Id.* at 714, 198 P.2d at 19.

112. 268 U.S. 510 (1925).

lieve that the need to prevent overpopulation provides such a compelling public interest as to justify some government intrusion into marriage, sex, and reproduction.¹¹³

Freedom of Religion and State Control of Fertility

Substantial religious objections will undoubtedly be raised against any efforts to assert state power over human fertility, whether the power is used to compel or prohibit the use of the fruits of the biological revolution. The Second Vatican Council of the Roman Catholic Church took the position that man has an "inalienable right to marry and generate children" and that decisions on this matter "can in no way be left to the judgment of public authority."¹¹⁴ In addition, the American Catholic Bishops have urged "our political leaders [to] be on guard that the common good suffer no evil from public policies which tamper with the instincts of love and the sources of life."¹¹⁵ While the National Council of Churches has supported government programs to educate couples to the voluntary use of contraception, it has defended "the moral freedom of a couple to choose the size of their family."¹¹⁶ Similarly, the Central Conference of American Rabbis, while not approving coercion, has acknowledged the government's "rights and obligation to make access to planned parenthood information available to all who seek it."¹¹⁷ The Baptist churches have urged the government to become involved in educational programs of conception control, so long as these programs are voluntary.¹¹⁸

Just as the churches have resisted coercive application of state power to programs of fertility control, there will be substantial religious objection to any state sponsored program of life control. Leading theologians have already lined up on different sides of the genetic manipulation issue. Professor Gustafson of Yale has suggested that

113. Davis, *Population Policy: Will Current Programs Succeed?*, 158 *SCIENCE* 730 (1967); Hardin, *The Tragedy of the Commons* 162, *SCIENCE* 1243 (1968).

114. The Second Vatican Council, *The Church in the Modern World* § 2-87.

115. The Government and Birth Control, Statement of Bishops of the United States, Washington, D.C., Nov. 14, 1966. In this statement the bishops contended that welfare recipients were being coerced into conception control.

116. Statement of R. H. Edwin Espy, General Secretary of the National Council of Churches, Nov. 15, 1966; the text of this public statement is reprinted in *FAMILY PLANNING IN AN EXPLODING POPULATION* 97 (J. O'Brien ed. 1968).

117. Statement of Jacob J. Weinstein, President of the Central Rabbis Conference, 1966; reprinted in *FAMILY PLANNING IN AN EXPLODING POPULATION* 101 (J. O'Brien ed. 1968).

118. Resolution of the America Baptist Convention, 1963, quoted in *FAMILY PLANNING IN AN EXPLODING POPULATION* 130 (J. O'Brien ed. 1968).

such manipulation should be opposed if it produces antihuman consequences.¹¹⁹ Professor McCormick, of Loyola University of Chicago, condemns all asexual reproduction.¹²⁰ In contrast, Professor Fletcher of Virginia supports state sponsored, designed genetic changes in man if the circumstances of history call for it.¹²¹ In primitive form these views anticipate various religious or moral attitudes toward life control in the future. Whether the state prohibits private use of genetic manipulation or encourages such activities we can expect that First Amendment freedom of religion issues will be raised.

What are the limits on the power of the state to intervene in human reproduction in a manner contrary to religious belief? In *Reynolds v. United States*¹²² the Supreme Court affirmed a criminal conviction for bigamy of a man whose religion permitted and encouraged polygamy. While Congress could not prohibit a religious belief, the opinion of Chief Justice Waite made it clear that Congress had the power to legislate for the social good in regard to family life and sex, even if such legislation was contrary to particular religious tenets. A subsequent case even affirmed the power of Congress to intrude into the corporate life of a religious organization which advocated sexual conduct contrary to that permitted by law.¹²³ But if the state requires conduct which violates a person's religious belief it must show a compelling reason for doing so. In *Sherbert v. Verner*¹²⁴ the Supreme Court, in applying this test, held that South Carolina could not refuse unemployment benefits to a person who was unwilling to work on Saturday because of religious beliefs.

As stated above, a substantial number of persons will resist state sponsored programs of eugenic improvement simply because such programs invariably strike at the basic values proposed by religion.

Eugenic programmers . . . are prompted by excellent intentions; but if they involve the dissolution of the family, the refusal of parenthood to all but an elite few, mass sterilization, the production of babies from sperm and ova banks under laboratory

119. Gustafson, *Basic Issues in the Bio-Medical Fields*, 52 SOUNDINGS 151 (1970).

120. McCormick, *Notes on Moral Theology*, 30 THEOLOGICAL STUDIES 680 (1969).

121. Fletcher, *Ethical Aspects of Genetic Controls*, 285 NEW ENGLAND J. MEDICINE 776 (1971).

122. 98 U.S. 145 (1878).

123. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890), *decree entered*, 140 U.S. 665 (1891).

124. 374 U.S. 398 (1963).

conditions, and the rigid regimentation of society, then the Christian must demur.¹²⁵

Similarly, substantial numbers of citizens would resist on religious grounds the proposal for compulsory abortion advocated (albeit as a last resort) by biologists Paul and Anne Ehrlich.¹²⁶ It may be that the state cannot coerce a person to pray,¹²⁷ or salute a flag,¹²⁸ if this offends his conscience, but it may constitutionally compel a person to act contrary to his religious belief if the state's interest is found to be sufficient. Thus, religious convictions will not prevent the state from compelling vaccination.¹²⁹ In view of these holdings it can be concluded that the religious freedom requirement of the First Amendment will not absolutely bar state compulsion over human fertility.

Conclusion

Proposals for state involvement in the process of fertility control, whether for demographic or eugenic reasons, portend a direct threat to certain individual freedoms now recognized by the law.¹³⁰ Nevertheless, it will soon be argued that the government has a right to pressure—or even compel—participation in programs of fertility control at the expense of private freedoms “based on the purpose of the various individual freedoms—to enhance the quality of life for all those who live under the Constitution.”¹³¹ The issue is drawn: in respect to the private values of family, sex and human reproduction we will be forced to strike a balance between the needs of the individual and the community. In coming decades the right of the individual to live, love, and procreate will be put in issue as never before in human history. The pressure of supposed necessity will create a great temptation to sacrifice the individual and his family and sexual freedoms. As has been shown, the biological revolution will create new powers for man, but these powers may also be used to limit individual freedom.

125. Hughes, *Theological Principles in the Control of Life*, in BIRTH CONTROL AND THE CHRISTIAN 93 at 146 (W. Spitzer & C. Saylor ed. 1969).

126. P. EHRLICH & A. EHRLICH, *POPULATION, RESOURCES, ENVIRONMENT: ISSUES IN HUMAN ECOLOGY* 274 (1970).

127. See *Engel v. Vitale*, 370 U.S. 421 (1962).

128. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

129. Cf. *Winters v. Miller*, 306 F. Supp. 1158, 1166-71 (E.D.N.Y. 1969) & authorities cited therein.

130. See Clark, *Law as an Instrument of Population Control*, 40 U. COLO. L. REV. 179, 198 (1968).

131. Comment, *Population Control—The Legal Approach to a Biological Imperative*, 1 *ECOLOGY L.Q.* 143, 172 (1971).

We may someday accept or even demand the use of these powers to control human fertility, but we must give serious consideration to the possibility that freedom may not survive the loss of individual choice over the roots of human existence.